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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. DONNA MAE PRESTON, Defendant and Appellant.	A103369 (Humboldt County Super. Ct. No. CR023721)

Defendant was convicted following a jury trial of first degree murder (Pen. Code, § 187, subd. (a)), with personal use of a firearm (Pen. Code, § 12022.53, subd. (d)), and the special circumstance of lying in wait (Pen. Code, § 190.2, subd. (a)(15)). She was sentenced to a term of life without parole, and a restitution fine was imposed (Pen. Code, § 1202.45). In this appeal she argues that the trial court erred by failing to give her requested instruction on unreasonable defense of another, and imposed an unauthorized restitution fine. We find that the unreasonable defense instruction was not supported by the evidence, but agree with defendant that the restitution fine was not authorized by Penal Code section 1202.45. We therefore strike the restitution fine but otherwise affirm the judgment.

STATEMENT OF FACTS

On July 19, 2002, defendant shot and killed the victim Kevin LaPorta, who was the father of her granddaughter Kara, born in October of 2000. Defendant's daughter Heather Pearce is Kara's mother. Pearce and LaPorta were not married, and before May

of 2002, were not governed by any formal order that provided for the legal or physical custody of Kara.

In late March or early April of 2002, defendant began to express "concerns" to Pearce that LaPorta "may be molesting Kara" following an evening visit with him. Pearce did not speak to LaPorta about defendant's accusations. A few weeks later, in late April of 2002, Pearce and LaPorta "verbally agreed" that Kara would begin overnight visitation with the victim at his home in Mad River, California, each Wednesday evening through Friday morning. The first overnight visit by Kara with LaPorta was uneventful, so Pearce and defendant "thought it was over, he wasn't really molesting her."

After the second overnight visit, Kara returned to Pearce's home in Trinidad in the morning. Later that day, Pearce noticed that Kara "was touching herself" in "her vulva area," and upon closer inspection detected that her "clitoral hood was swollen on one side." The discovery "solidified" her and defendant's suspicions that LaPorta was molesting Kara.

The next day Pearce and defendant took Kara to two hospitals to report that they suspected molestation and obtain an examination of her. According to Pearce, the Humboldt County Sheriff's Department "discouraged" them from conducting a sexual assault examination of Kara "because they said it wasn't going to do any good" and "was highly invasive." Therefore, an examination of Kara was not done that day.

The following week, on Wednesday, May 1, 2002, LaPorta collected Kara and her belongings for a third visit to his residence in Mad River. The arrangement called for LaPorta to return Kara to Pearce the next Friday morning in the parking lot of his acupuncturist office on E Street in Eureka. Pearce and defendant arrived at the parking lot as scheduled, but LaPorta was not there, so Pearce proceeded upstairs to his office on the fifth floor. When Pearce entered the office she noticed that Kara was on the rug with her diaper removed. LaPorta "said that he was changing her diaper," which Pearce considered unusual. LaPorta "didn't change diapers much," and Kara's diaper was "barely wet." Pearce was "suspicious," so she removed Kara's diaper when she returned

to her car. Pearce and defendant observed that Kara had "two spots" of "a creamy white substance" on "both sides of her vagina" which they thought "was semen."

Defendant and Pearce took Kara to Mad River Hospital in Arcata for an examination. Detective Robert Metaxas of the Eureka Police Department arrived at the hospital around noon in response to the report of a "possible child molest." He arranged for a sexual assault examination of Kara by a nurse practitioner, which was conducted later that afternoon.

On May 8, 2002, Detective Metaxas informed Pearce that the test results confirmed the swab taken from Kara "tested positive for semen." He also warned Pearce that she must either "guarantee" LaPorta "would never be alone" with Kara, or he would place the child "in protective custody."

Detective Metaxas obtained a search warrant for LaPorta's residence and interviewed him on May 8, 2002. When confronted with the fact that semen had been found on Kara, LaPorta seemed "totally shocked." LaPorta was cooperative with the investigation. He agreed to provide a blood sample to be compared with the swab taken from Kara, and take a lie detector test. A DNA sample was also taken from Pearce.

Pearce subsequently consulted an attorney and "filed papers" to request "only supervised visits" between Kara and LaPorta. LaPorta also obtained an attorney, and thereafter supervised visits occurred twice weekly. Although the visits were supervised, defendant remarked to Pearce that LaPorta might nevertheless molest the child "right in front of" the supervisor through the use of "prestidigitation skills." At the suggestion of a friend, defendant dressed in a disguise, with a wig, sunglasses and lipstick, to clandestinely "watch the supervised visit."

On July 9, 2002, Detective Metaxas learned that the DNA analysis positively eliminated LaPorta as a source of the sample taken from Kara. The detective therefore turned the focus of his investigation to the two remaining suspects: Pearce and defendant. Detective Metaxas was concerned that "someone had planted the semen" on Kara.

When Detective Metaxas told Pearce that LaPorta had been eliminated as a possible source of the semen, she was "astounded" and stated she "didn't believe" him.

Although Pearce's blood sample had not yet been submitted for examination, to get a "reaction" from her Detective Metaxas employed an investigative "ruse" by asking "if there was any way her DNA could be in that sample." Pearce felt that Detective Metaxas "was definitively accusatory" in his tone; she replied, "There is no way for it to be there." She was concerned that she might be arrested, and told Detective Metaxas, "Kevin set me up."

Defendant and Pearce both believed that LaPorta had somehow "planted false semen" to implicate Pearce. Later that day, defendant told Pearce that she "was going to go out and get some shoes that were ready for her at the store." She left the house and hitchhiked to Eureka carrying her brown backpack. Pearce expected defendant to return before dark.

Defendant was seen in the parking lot of LaPorta's office at E and 4th Streets in Eureka from 2:00 or 3:00 to 6:00 in the afternoon, sitting on a curb at the corner of a building. She was wearing a red or auburn wig and sunglasses. As LaPorta left his office building at nearly 6:30 p.m. to walk his two dogs across the parking lot toward his truck, defendant approached him, pulled out a Charter Arms .38 revolver she had purchased two months before at a local gun shop, and shot him twice from close range. After LaPorta fell to the ground, defendant fired two or three more shots at him as he screamed. LaPorta arose and ran awkwardly into a nearby restaurant. Defendant reloaded her gun and followed LaPorta all the way into the kitchen of the restaurant. Defendant fired two more shots at LaPorta before she left the kitchen and walked to a bench in a waiting area near the cash register, where she sat down. Defendant apologized for the commotion, and mentioned that she was "just out to get him because he molested my granddaughter."

The police arrived momentarily, handcuffed defendant, and seized her handgun. When an officer asked if anyone was hurt, defendant said, "I think I just killed a guy in there." LaPorta was found lying in the kitchen with obvious gunshot wounds to his head and chest, and "no signs of life." The victim suffered a total of six gunshot wounds all fired from defendant's Charter Arms revolver. The two shots to the victim's head—the right temple and left ear—were fired at very close range and were each fatal.

In subsequent interviews defendant stated that she "absolutely" intended to kill LaPorta to protect her granddaughter. Defendant expressed that she was "glad" she had killed him and "didn't just hurt him." Defendant had thought about shooting LaPorta since "she suspected that he was molesting" Kara. Defendant expressed that she "was absolutely sure" LaPorta had molested Kara, and had planted "random sperm" on the child to remove suspicion from himself and implicate Pearce. Defendant feared that LaPorta was "trying to frame" Pearce so she would "go to jail" for making a false accusation against him, and "lose her baby to him." Defendant stated: "[I]f I hadn't killed him, he might have succeeded. She could have lost her baby to him." When defendant learned that LaPorta passed a lie detector test and the DNA sample taken from Kara was "not Kevin's and they find Heather's DNA," she thought, "not only is he gonna get her, but Heather's gonna lose her . . . you know . . . and that's when I decided to just do it."

Defendant stated that she hitchhiked to Eureka, put on her disguise, loaded her gun, and waited in the parking lot for LaPorta near his truck. When the victim reached his truck and opened the rear compartment for his dogs, defendant walked up to within three or four feet of him, pulled out her gun and fired a total of five shots at him in the parking lot. LaPorta fled from the parking lot into a restaurant, so defendant "ran after him." She found LaPorta in the kitchen lying between two steel cabinets. She fired two more shots into the victim's head, and thought, "I really got him."

The defense presented testimony from acquaintances of defendant who confirmed that she was "quite agitated," angry and "desperate" about the suspected molestation of Kara by LaPorta. Defendant was "horrified" that LaPorta continued to have contact with the child, and "nobody stopped the visits." The witnesses testified that the molestation of defendant's granddaughter "was just a consuming concern for her."

At the sanity phase of the trial, two witnesses offered expert opinion testimony. Dr. Robert Soper, a psychiatrist, reached the conclusion that defendant suffers from "a personality disorder with histrionic and schizotypal traits." Defendant "has a very impressionistic way of thinking about things and she reacts from a feeling base rather

than a thinking base." She thinks in "black and white" terms, and is focused "on herself and how she thinks and feels about things and less concerned about other people's points of view." In "jumping to a conclusion" that LaPorta was "molesting her granddaughter" and "set her and her daughter up," defendant "overinterpreted events" to "fit her theory." Dr. Soper offered his opinion that defendant did not come within the legal definition of insanity. She understood the nature and quality of her acts in shooting LaPorta with the intent to kill him. Defendant was guilty of a "cognitive error" in her conviction that LaPorta was molesting Kara, and a "moral error" in her "presumption that it was right for her to kill a man whom she believed was molesting" her granddaughter.

Psychologist Dr. Paul Berg testified that defendant suffered from a "delusionary disorder" of a "persecutor type." Defendant's "idea" that "Kevin LaPorta was molesting her grandchild" was a product of "her delusionary interpretation of facts." Dr. Berg's opinion was that defendant could not "comprehend in a meaningful way that what she did was wrong. In fact she believes what she did was totally right." Due to her delusionary disorder defendant could not "distinguish right from wrong" or know the nature and quality of what she did." In defendant's mind, the "only right thing she could do" to "protect Kara from molestation and eventual death" was to kill LaPorta, although she realized her actions were "legally wrong."

DISCUSSION

I. The Failure to Give an Instruction on Unreasonable Defense of Another.

Defendant argues that the trial court erred by refusing to give an instruction requested by the defense on imperfect or unreasonable defense of another in the terms of CALJIC No. 5.17. Defendant maintains that the evidence demonstrated *her belief*, even if unreasonable, that the victim "presented an imminent threat to her granddaughter." She therefore complains that the trial court "was required to instruct as requested," but erroneously "substituted its own view of imminence" in denying the proposed imperfect defense of another instruction. Respondent contends that the imperfect self-defense doctrine does "not extend to the wrongful defense of another" under California law, and the instruction was not supported by adequate evidence of defendant's "actual, subjective

belief" that "she had to use lethal force to protect her granddaughter from any imminent danger of great bodily injury or death."

The culpability for an unlawful killing with the intent to kill or with conscious disregard for life, but in the actual, although unreasonable, belief of imminent danger of death or great bodily injury, is reduced from murder to voluntary manslaughter. (*People v. Lewis* (2001) 25 Cal.4th 610, 645; see also *People v. Johnson* (2002) 98 Cal.App.4th 566, 572.) Under the unreasonable or imperfect defense doctrine,[1] the element of malice necessary to sustain a conviction of first or second degree murder is negated by evidence that the defendant had an honest but unreasonable belief in the need to undertake defensive acts. (*In re Christian S.* (1994) 7 Cal.4th 768, 783; *People v. Wickersham* (1982) 32 Cal.3d 307, 328; *People v. Flannel* (1979) 25 Cal.3d 668, 679.) An honest belief in the need to defend oneself, even if unreasonable, is inconsistent with malice, and reduces the crime from murder to manslaughter. (*People v. Flannel, supra,* at p. 679; *People v. Hayes* (2004) 120 Cal.App.4th 796, 802; *People v. Cleaves* (1991) 229 Cal.App.3d 367, 377.) The doctrine is based upon the theory that " 'an individual cannot genuinely perceive the need to repel imminent peril or bodily injury and simultaneously *be aware that society expects conformity to a different standard*.' [Citation.]" (*People v. Hayes, supra,* at p. 803.) Thus, "in a murder case, unless the People's own evidence suggests that the killing may have been provoked or in honest response to perceived danger, it is the defendant's obligation to proffer some showing on these issues sufficient to raise a reasonable doubt of his guilt of murder." (*People v. Rios* (2000) 23 Cal.4th 450, 461-462.)

Unreasonable self-defense or defense of another is therefore "not a true defense; rather, it is a shorthand description of one form of voluntary manslaughter. And voluntary manslaughter, whether it arises from unreasonable self-defense or from a killing during a sudden quarrel or heat of passion, is not a defense but a crime; more precisely, it is a lesser offense included in the crime of murder." (*People v. Barton*

[1] We refer to both self-defense and defense of others with the term unreasonable defense, although we realize that the existence of unreasonable defense of another as a theory of mitigation is subject to dispute.

(1995) 12 Cal.4th 186, 200-201.) Accordingly, when a defendant is charged with murder the trial court's duty to instruct on unreasonable defense "is the same as its duty to instruct on any other lesser included offense: this duty arises whenever the evidence is such that a jury could reasonably conclude that the defendant killed the victim in the unreasonable but good faith belief in having to act in self-defense." (*Id*. at p. 201) "The sua sponte duty to instruct, and a fortiori, the responsibility to provide instructions on request, in connection with a lesser offense such as voluntary manslaughter exists when there is substantial evidence to support the defendant's culpability of the necessarily included crime." (*People v. Sinclair* (1998) 64 Cal.App.4th 1012, 1016.) "The general rule is that in a criminal case the trial court must instruct on the 'principles of law relevant to the issues raised by the evidence [citations] and has the correlative duty "to refrain from instructing on principles of law which not only are irrelevant to the issues raised by the evidence but also have the effect of confusing the jury or relieving it from making findings on relevant issues." [Citation.]' [Citation.]" (*People v. Mobley* (1999) 72 Cal.App.4th 761, 781; see also *People v. Armstead* (2002) 102 Cal.App.4th 784, 792; *People v. Watie* (2002) 100 Cal.App.4th 866, 883.)

In a murder case, this means that both heat of passion and unreasonable defense, "as forms of voluntary manslaughter, must be presented to the jury if both have substantial evidentiary support." (*People v. Breverman* (1998) 19 Cal.4th 142, 159-160.) " ' "Substantial evidence is evidence sufficient to 'deserve consideration by the jury,' that is, evidence that a reasonable jury could find persuasive." [Citation.]' [Citation.]" (*People v. Cunningham* (2001) 25 Cal.4th 926, 1008; see also *People v. Marshall* (1997) 15 Cal.4th 1, 39.) The need to instruct on a voluntary manslaughter theory based upon unreasonable defense "arises only when there is substantial evidence" that the defendant killed in unreasonable defense, "not when the evidence is 'minimal and insubstantial.' " (*People v. Barton, supra,* 12 Cal.4th 186, 201, fn. omitted; see also *People v. Rodriguez* (1997) 53 Cal.App.4th 1250, 1275; *People v. Middleton* (1997) 52 Cal.App.4th 19, 33.) " ' "Doubts as to the sufficiency of the evidence to warrant instructions should be resolved in favor of the accused." [Citations.]' [Citation.] Even so, the test is not

whether *any* evidence is presented, no matter how weak. Instead, the jury must be instructed when there is evidence that 'deserve[s] consideration by the jury, i.e., "evidence from which a jury composed of reasonable [people] could have concluded" ' that the specific facts supporting the instruction existed. [Citations.]" (*People v. Petznick* (2003) 114 Cal.App.4th 663, 677.) "We review this issue as one of law." (*People v. Sinclair, supra,* 64 Cal.App.4th 1012, 1017.)

We conclude that substantial evidence to support an instruction on unreasonable defense of another was not adduced at trial. The unreasonable defense doctrine demands proof of a subjectively honest, if unreasonable, actual belief in the need to engage in lethal force to prevent imminent peril to life or serious injury. (*People v. Flannel, supra,* 25 Cal.3d 668, 674; *People v. Glenn* (1991) 229 Cal.App.3d 1461, 1467; *People v. Aris* (1989) 215 Cal.App.3d 1178, 1186.) "It is the honest belief of *imminent peril* that negates malice." (*People v. Hayes, supra,* 120 Cal.App.4th 796, 803, italics added.) The unreasonable defense doctrine "recognizes that in order to warrant a conviction of manslaughter rather than murder, the defendant must honestly (if unreasonably) believe that *serious injury is imminent* and that lethal force is necessary." (*People v. Uriarte* (1990) 223 Cal.App.3d 192, 197, italics added.) The defendant must actually entertain the belief that the danger is "imminent." (*People v. Flannel, supra,* at p. 674; see also *People v. Robertson* (2004) 34 Cal.4th 156, 167; *People v. Aris, supra,* at pp. 1186-1187.) "Imminence is a critical component" of a theory of unreasonable defense. (See *People v. Humphrey* (1996) 13 Cal.4th 1073, 1094.) "There must be evidence the defendant feared imminent, not just future, harm." (*People v. Minifie* (1996) 13 Cal.4th 1055, 1068.)

The element of a belief in an imminent threat of harm to another is absent from the evidence in the record before us. Defendant was convinced that the victim had sexually molested her granddaughter, and feared he would obtain custody of Kara. Nothing in the defendant's statements or the circumstances of the killing, however, demonstrates that she acted pursuant to a need to repel *imminent* peril or bodily injury to either Kara or Pearce. First, defendant did not react to a fortuitous threatening situation, but rather planned the killing before she left the house in Trinidad, when she learned the DNA test

eliminated LaPorta and they had no "evidence on him anymore." When the killing occurred the victim was not in a position to either directly molest Kara—he was not even anywhere near her—or take custody of the child from Pearce—he had been granted only supervised visits with the child. Defendant's statements reflect that she perceived a speculative and future but not imminent threat to her granddaughter and daughter from the victim. Defendant asserted that if she "hadn't killed" LaPorta her daughter "*could have* lost her baby to him." (Italics added.) The evidence indicates that as defendant waited in the parking lot to shoot the victim she feared potential forthcoming consequences, which she may have supposed were expected or even unavoidable, but not a threat of immediate harm.

"A 'phantasmagoria of future harm' . . . will not diminish criminal culpability." (*People v. Petznick, supra,* 114 Cal.App.4th 663, 676-677.) The unreasonable defense doctrine " 'is narrow. . . . Fear of future harm—no matter how great the fear and no matter how great the likelihood of the harm—will not suffice. The defendant's fear must be of *imminent* danger to life or great bodily injury. " '[T]he peril must appear to the defendant as immediate and present and not prospective or even in the near future. *An imminent peril is one that, from appearances, must be instantly dealt with*.' . . . [¶] This definition of imminence reflects the great value our society places on human life." [Citation.]' [Citation.]" (*In re Christian S., supra,* 7 Cal.4th 768, 783; see also *People v. Rodriguez, supra,* 53 Cal.App.4th 1250, 1269; *People v. Sekona* (1994) 27 Cal.App.4th 443, 449.) Here, even considered in the light of defendant's misconceived belief system, the prospective harm from the victim was at most approaching, but never imminent.

Further, the unreasonable defense doctrine as articulated in *Flannel, supra,* 25 Cal.3d 668 is premised upon the accepted "inherent incompatibility between malice," as that term has been defined in the law, "and the honest belief in the need to defend oneself—i.e., that one "cannot genuinely perceive the need to repel imminent peril or bodily injury and simultaneously be aware that society expects conformity to a different standard." (*People v. Son* (2000) 79 Cal.App.4th 224, 238; quoting *People v. King* (1991) 1 Cal.App.4th 288, 298-299.) In contrast, " 'a person who carefully weighs a

course of action, and chooses to kill after considering reasons for and against, is normally capable of comprehending his societal duty to act within the law. "If, *despite such awareness*, he does an act that is likely to cause serious injury or death to another, he exhibits that wanton disregard for human life or antisocial motivation that constitutes malice aforethought." ' [Citation.]" (*People v. Sekona, supra,* 27 Cal.App.4th 443, 452.) Defendant's statements reveal that she not only planned the shooting, but was cognizant that her considered course of action violated social and legal standards. Defendant expressed an awareness that she was going to spend her life in jail or "may get the death penalty," but was willing to "sacrifice" herself for her children. She did not perceive an honest but unreasonable belief in the need to repel imminent peril or bodily injury. Rather, she acted in accordance with an objective to avert a threat of possible or expected future harm from the victim, despite her acknowledged realization of the adverse legal consequences to her.

The self-defense and defense of another doctrines entitle a person to use force to repel what is honestly "perceived to be a threat of imminent harm." (*People v. Robertson, supra,* 34 Cal.4th 156, 167.) Absent any evidence that suggests defendant entertained a belief in an imminent threat and the necessity to take immediate defensive action to prevent loss of life or serious bodily injury, the trial court properly declined to give a CALJIC No. 5.17 instruction. (*People v. Uriarte, supra,* 223 Cal.App.3d 192, 197-198.)[2]

[2] In light of our conclusion that an instruction on unreasonable defense of another was not supported by substantial evidence of belief in an imminent threat, we need not confront the issue of whether the doctrine is given recognition in California to mitigate the culpability of a killing from murder to manslaughter. The existence of unreasonable defense of another as a viable theory is currently before the California Supreme Court for resolution. (See *People v. Randle* (2003) 109 Cal.App.4th 313, review granted Aug. 27, 2003, S117370.) The court previously noted: "The doctrine of unreasonable or imperfect defense of others, in contrast to the doctrine of unreasonable or imperfect self-defense, is not well established in California law. It has been recognized in only one decision, *People v. Uriarte* (1990) 223 Cal.App.3d 192, 198 [272 Cal.Rptr. 693], and there the court found the doctrine inapplicable because Uriarte did not present evidence that he believed (reasonably or unreasonably) that the asserted danger to his wife was imminent or that shooting the victims was necessary to rescue her." (*People v. Michaels* (2002) 28 Cal.4th 486, 529.)

II. The Imposition of a Parole Revocation Fine.

Defendant also argues that imposition of a parole revocation fine by the trial court violated Penal Code section 1202.45. The Attorney General concedes that the parole revocation fine was not authorized by statute, and we agree. Penal Code section 1202.45 provides for a restitution fine for conviction of a crime "whose sentence includes a period of parole." Defendant was sentenced to a life term without the possibility of parole, so a parole revocation fine cannot be imposed upon her. (*People v. Petznick, supra*, 114 Cal.App.4th 663, 687; *People v. Oganesyan* (1999) 70 Cal.App.4th 1178, 1183.)

DISPOSITION

Accordingly, the parole revocation fine is stricken, and the judgment is affirmed in all other respects.

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Swager, J.

We concur:

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Marchiano, P. J.

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Margulies, J.